(2)

No. 09-683

IN THE

Supreme Court of the United States

ANNETTE CARMICHAEL, Individually and as Guardian for KEITH CARMICHAEL, an incapacitated adult,
Petitioners,

v.

KELLOGG BROWN & ROOT SERVICES, INC., HALLIBURTON ENERGY SERVICES. INC., AND RICHARD IRVINE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the political question doctrine bars adjudication of Petitioner's personal injury suit, which would require reexamination of U.S. Army policies, judgments, and decisions relating to the planning and execution of a war-time military fuel supply convoy in Iraq during Operation Iraqi Freedom.

CORPORATE DISCLOSURE STATEMENT

Respondent Kellogg Brown & Root Services, Inc. is a wholly owned subsidiary of KBR, Inc.

Respondent Halliburton Energy Services, Inc. is a wholly owned subsidiary of Halliburton Company.

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MISCELLANEOUS

U.S. Const. art. I, § 8 4

U.S. Const. art. II, § 2 4

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BRIEF IN OPPOSITION

OPINIONS BELOW

The Eleventh Circuit's opinion affirming dismissal of Petitioner's damages suit (Pet. App. 1a-56a) is published at 572 F.3d 1271. The district court's opinion granting Respondents' motion to dismiss (Pet. App. 57a-77a) is published at 564 F. Supp. 2d 1363. The district court's initial opinion, denying Respondents' motion to dismiss but allowing that motion to be renewed following completion of discovery (Resp. App. 1a-18a), is published at 450 F.

Supp. 2d 1373 and included in the appendix to this brief.

STATEMENT OF THE CASE

1. "The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986). Because a political question is an issue that is "entrusted to . . . the political branches" of the Federal Government, *Vieth v. Jubelirer*, 541 U.S. 267, 277 (2004), "[t]he nonjusticiability of a political question is primarily a function of the separation of powers." *Baker v. Carr*, 369 U.S. 186, 210 (1962); *see also Powell v. McCormack*, 395 U.S. 486, 517 (1969) ("[A] 'political question' [is] a question which is not justiciable in federal court because of the separation of powers provided by the Constitution."). Under Article III, "no justiciable 'controversy' exists when parties seek adjudication of a political question." *Mass. v. EPA*, 549 U.S. 497, 516 (2007); *see also Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 215 (1974) ("[T]he concept of justiciability, which expresses the jurisdictional limitations imposed upon federal courts by the 'case or controversy' requirement of Art. III, embodies . . . the political question doctrine[ ] . . . ."); *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 981 (9th Cir. 2007) (The political question doctrine "is at bottom a jurisdictional limitation imposed on the courts by the Constitution, and not by the judiciary itself.").

In *Baker v. Carr*, this Court "set forth six independent tests for the existence of a political question." *Vieth*, 541 U.S. at 277. Any one of these *Baker* political question formulations, which "are probably listed in descending order of both importance and certainty," is sufficient to establish the presence of a nonjusticiable political question. *Id.* at 278. They begin with (i) "a textually demonstrable constitutional commitment of the issue to a coordinate political department," and (ii) "a lack of judicially discoverable and manageable standards for resolving it." *Id.* at 277-78 (citing *Baker*, 369 U.S. at 217). Thus, "[i]n determining whether a question falls within (the political question) category, the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations." *Baker*, 369 U.S. at 210 (internal quotation marks omitted).

"It would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches"—or "an area of governmental activity in which the courts have less competence"—than "[t]he complex subtle, and professional decisions as to the composition, training, equipping and control of a military force." *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973); *see Hirabayashi v. United States*, 320 U.S. 81, 93 (1943) ("[T]he Constitution commits to the Executive and to Congress the exercise of the war power in all the vicissitudes and conditions of warfare . . . ."); *Aktepe v. United States*, 105 F.3d 1400, 1403 (11th Cir. 1997) ("The Constitution

emphatically confers authority over the military upon the executive and legislative branches of government."); *Tiffany v. United States*, 931 F.2d 271, 277 (11th Cir. 1991) ("Of the legion of governmental endeavors, perhaps the most clearly marked for judicial deference are provisions for national security and defense.").

In view of the Constitution's commitment of the War Powers to the political branches, *see* U.S. Const. art. I, § 8 and art. II, § 2, and the concomitant lack of judicial standards for examining military policies and decisions, "[t]he political question doctrine, grounded in the separation of powers . . . operates to insulate sensitive military judgments from judicial review." *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1357 (11th Cir. 2007). Indeed, the nonjusticiability of military policies, judgments, and decisions is "an arena in which the political question doctrine has served one of its most important and traditional functions—precluding judicial review of decisions made by the Executive during wartime." *Lane v. Halliburton*, 529 F.3d 548, 558 (5th Cir. 2008).

Application of the political question doctrine requires a "discriminating inquiry into the precise facts and posture of the particular case." *Baker*, 369 U.S. at 217. To conduct such a "case-by-case inquiry," *id.* at 211, a court "must analyze [a case] as it would be tried, to determine whether a political question will emerge." *Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo of Petroleum*, 577 F.2d 1196, 1202 (5th Cir. 1978). This threshold justiciability analysis is not limited to what a plaintiff alleges, how she characterizes her claims or

would attempt to prove them, or her legal theories. The analysis also must address how the case likely would be *defended* at trial. *See Lane*, 529 F.3d at 565 ("We must look beyond the complaint, considering how the Plaintiffs might prove their claims *and* how [the Defendants] would defend.").

2. Petitioner Annette Carmichael's husband, a U.S. Army sergeant, was seriously injured while protecting a military fuel supply convoy in Iraq during Operation Iraqi Freedom. He was serving as a "shooter" in a convoy tanker truck that overturned while attempting to negotiate a dangerous "S" curve on a poorly maintained, insurgent-infested, military supply route known as ASR Phoenix. The record establishes that the U.S. Army planned and controlled virtually every aspect of the convoy, including its exact timing, route, configuration, and speed.

Respondent Richard Irvine, a civilian, was behind the wheel of the convoy truck that overturned. He was employed by Respondent Kellogg Brown & Root Services, Inc. ("KBRSI"), which provided jet fuel transportation and other mission-critical support services to the U.S. military under a Logistics Civil Augmentation Program ("LOGCAP") contract and implementing Task Orders.

3. Mrs. Carmichael filed this state-law damages suit against Respondents in Georgia state court on behalf of her husband and herself. Shortly after removing the action to the U.S. District Court for the Middle District of Georgia, Respondents moved to dismiss for lack of subject-matter

jurisdiction on the ground of the political question doctrine. Respondents' motion contended that adjudication of the suit would require the court to examine nonjusticiable political questions ranging from the wisdom of the U.S. military's policy of using civilian contractors to provide combat-related logistical support services in Iraq (such as driving tanker trucks in military fuel supply convoys), to the Army's policies, judgments, and decisions in connection with the planning and execution of the particular military convoy involved in this suit.

a. The district court denied Respondents' initial motion to dismiss. Resp. App. 1a, 18a. The court explained that "[t]he discovery period has just begun, and because of the limited facts, it is impossible to say with certainty whether this case will involve a nonjusticiable political question." *Id.* 7a. The court further indicated that "[i]f additional facts appear during the discovery period that are germane to Defendants' political question argument, Defendants may renew their motions to dismiss on this ground." *Ibid.*

b. During the course of discovery, Respondents obtained extensive jurisdictional evidence relevant to the applicability of the political question doctrine to the circumstances of this case. This evidence not only included the deposition testimony of six KBRSI employees with first-hand knowledge of the convoy rollover incident in which Sgt. Carmichael was injured,[1] but also four

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[1] These KBRSI personnel are Respondent Irvine, who drove the truck involved in the rollover incident (Record

(footnote continued on next page)

declarations provided by the U.S. Army.[2] The court of appeals subsequently confirmed that the "testimony of both Army and KBR personnel . . . leaves no doubt [about] the military's complete control over military convoys." Pet. App. 21a.

c. Following completion of discovery, Respondents filed, under Fed. R. Civ. P. 12(b)(1), a renewed motion to dismiss on political question grounds. After reviewing the jurisdictional evidence

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on Appeal ("R") 4-94, Ex. 13); Holmes O. Brockett, who drove a KBRSI recovery vehicle in the convoy (R4-94, Ex. 11); Robert E. Stonebraker, who was the senior KBRSI member in the convoy (R4-94, Ex. 12); Kenneth A. Gardner, who was the KBRSI transportation foreman responsible for the KBRSI personnel on the convoy (R4-94, Ex. 14); Frazier Shack, who was the KBRSI senior transportation manager in Iraq responsible for the convoy (R4-94, Ex. 15); and Arthur E. Lange, who was KBRSI's Project Manager for KBRSI's Theater Transportation Mission in Iraq (R4-94, Ex. 16).

[2] These military declarants are (i) Major Gerald Tucker, the commander of Sgt. Carmichael's Army company (R4-94, Ex. 1); (ii) retired Major Robert W. Culver, former Army Administrative Contracting Officer responsible for the relevant KBRSI LOGCAP contract (R4-94, Ex. 2); (iii) Lt. Colonel Betty L. Holm, former Army manager responsible for planning, deploying, and tracking the military fuel supply convoy at issue (R4-94, Ex. 3); and (iv) former Staff Sgt. John C. Hansen, who was Team Leader of Sgt. Carmichael's squad in the convoy mission at issue and riding in a contractor-driven vehicle several trucks ahead of the convoy truck that Sgt. Carmichael was protecting (R4-94, Ex. 17).

submitted by Respondents, the district court found that "the army controlled the conduct of Carmichael's convoy at the most granular level." *Id.* 70a. Explaining that "Plaintiff's characterizations" regarding KBRSI's supposed control of the convoy "ignore the convoy driver's reality," *id.* 71a, the court granted respondents' motion to dismiss, holding that "this case would . . . require the Court to examine core military decisions and battlefield tactics." *Id.* 72a.[3]

4. On appeal, the Eleventh Circuit affirmed. The court of appeals agreed with the district court's determination that "adjudicating the dispute would require reexamination of the type of sensitive military judgments and decisions typically insulated from judicial review and that it was without judicially manageable standards for doing so." *Id.* 14a.

More specifically, "[a]fter thorough review [the court of appeals] conclude[d] that adjudicating the plaintiff's claims would require extensive reexamination and second-guessing of many sensitive judgments surrounding the conduct of a military convoy in war time -- including its timing, size, configurations, speed, and force protection." *Id.*

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[3] Because Respondents' Rule 12(b)(1) political question defense was a "factual attack" on the court's subject-matter jurisdiction, the district court was free to consider jurisdictional evidence (such as the Army declarations and KBRSI deposition testimony), and to weigh the facts rather than viewing them in the light most favorable to Petitioner. *See* Pet. App. 11a-12a; 61a-62a.

2a. In addition, the court of appeals held that it "can discern no judicially manageable standards for resolving the plaintiff's claims." *Ibid.* The court held, therefore, "that the political question doctrine bars the plaintiff's suit," and "affirm[ed] the district court's dismissal for lack of subject-matter jurisdiction." *Ibid.*

a. Citing its previous political question decisions in *McMahon* (a wrongful death suit filed on behalf of U.S. soldiers killed when a military contractor-operated aircraft crashed in Afghanistan) and *Aktepe* (a wrongful death suit involving Turkish sailors killed by missiles launched from an American aircraft carrier during a naval exercise), the court of appeals reaffirmed that "[t]here can be little doubt that military judgments generally fall into" the first *Baker* category of political questions—"issues entrusted by the Constitution's text to a coordinate political department." *Id.* 14a, 15a. The court cautioned that not "all cases involving the military are automatically foreclosed by the political question doctrine," but agreed with the district court "that Carmichael's suit would require reexamination of many sensitive judgments and decisions entrusted to the military in a time of war." *Id.* 15a, 16a.

Based on the expansive body of jurisdictional evidence developed during discovery in this case, the court of appeals concluded that "military judgments governed the planning and execution of virtually every aspect of the convoy in which Sergeant Carmichael was injured." *Id.* 16a. More specifically,

> the military decided the particular date and time for the convoy's departure; the

> speed at which the convoy was to travel; the decision to travel along a particular route (ASR Phoenix); how much fuel was to be transported; the number of trucks necessary for the task; the speed at which the vehicles would travel; the distance to be maintained between vehicles; and the security measures that were to be taken. Each of these critical determinations was made *exclusively by the military*.

Ibid. (emphasis added).

The court further observed that "each of these decisions required the specific exercise of military expertise and judgment." *Id.* 17a. "ASR Phoenix was a particularly treacherous roadway" because of its "serpentine path" and pothole-ridden physical condition due to "damage from IEDs and other munitions," and "most of all [because it] was a favored target of insurgent activity." *Id.* 7a, 17a. "In the face of these difficult military conditions, traveling on ASR Phoenix called for delicately-calibrated decisions based on military judgment, experience, and intelligence-gathering." *Id.* 17a. As a result, "the military made numerous notable tactical determinations concerning how the mission could most safely be executed." *Id.* 18a. For example, "[a] balance had to be struck so that the vehicles would be traveling swiftly enough to frustrate potential insurgent attacks, but not so fast that drivers would be unable to control their vehicles on the narrow, wandering, poorly-maintained road." Further, "it was necessary for the vehicles to maintain enough distance between one another to avoid becoming a condensed target for insurgent

attacks, but not so far apart as to lose artillery cover." *Ibid.* The court found that "[t]here is not the slightest hint in the record suggesting that KBR played even the most minor role in making any of these essential decisions." *Ibid.*

For these reasons, the court of appeals concluded that the first *Baker* political question formulation applies to, and forecloses, Petitioner's negligence claims relating to the manner in which Respondent Irvine operated the convoy vehicle that overturned.

> Because the circumstances under which the accident took place were *so thoroughly pervaded by military judgments and decisions*, it would be impossible to make any determination regarding Irvine's or KBR's negligence without bringing those essential military judgments and decisions under searching judicial scrutiny. Yet it is *precisely this kind of scrutiny* that the political question doctrine forbids.

Ibid. (emphasis added).

b. In concluding that the first *Baker* formulation applies, the court of appeals rejected each of Petitioner's arguments to the contrary.

(i) Petitioner asserted that Respondents, rather than the military, exercised control over the convoy. The court explained, however, that "the notion that KBR exercised any significant control over military convoys -- let alone 'main' control -- is completely implausible in light of the mountain of evidence to the contrary." *Id.* 20a; *see also id.* 21a (quoting U.S. Army declaration that "[t]he military convoy commander was in total command and

control of the convoy, including setting the speed at which the convoy traveled."). The court further indicated that "[t]he fact that Irvine had physical control over his tanker does not change the fact that he was operating at all times under orders and determinations made by the military. . . . [A]ny defense mounted by KBR or Irvine would undoubtedly cite the military's orders as the reason why Irvine did not reduce his speed." *Id.* 23a.

(ii) Petitioner contended that adjudicating her claims would not require the district court to "review" military judgments since, according to Petitioner, "Irvine's negligence alone caused the accident." *Ibid.* Based on its "careful review of the record in this case," however, the court of appeals rejected this argument, explaining that Petitioner "has not come close to showing that Irvine alone was responsible for the accident." *Id.* 24a, 26a. Instead, "in litigating the suit KBR would inevitably (and not without substantial evidential foundation) try to show that unsound military judgments and policies surrounding every aspect of the . . . convoy were either supervening or concurrent causes of the accident." *Id.* 27a. The court concluded that "[l]itigation involving these issues is undeniably foreclosed by the political question doctrine." *Ibid.*

(iii) The court disagreed with Petitioner's contention that the particular military judgments implicated by this case are not the kind traditionally insulated from judicial review. The court explained that "there can be little doubt that the military decisions plainly drawn into issue today -- concerning how to safely deliver vital military supplies through hostile territory in war time -- are

. . . 'essentially professional military judgments,' Gilligan, 413 U.S. at 10, and . . . properly insulated from judicial review." *Id.* 29a-30a.

c. The court of appeals further held that the second *Baker* formulation applies to this negligence suit because "given the extent to which the convoy was subject to military regulation and control," the court is "without any manageable standards for making reasoned determinations regarding [the] fundamental elements of negligence." *Id.* 31a. In so holding, the court rejected Petitioner's contention that "no special standards are needed to resolve the dispute." *Id.* 34a. The court explained that "[g]iven the circumstances under which the accident in this case took place . . . the question of whether [convoy truck driver] Irvine acted reasonably or breached the standard of care *cannot be answered by reference to the standards used in ordinary tort cases.*" *Id.* 31a (emphasis added). "[I]t would be impossible to ascertain Irvine's potential liability in connection with the rollover without determining the military's liability." *Id.* 33a.

d. In addition, the court of appeals held that Petitioner's claims for negligent training and supervision "must be dismissed, since these, like her other claims, inevitably would raise political questions prohibited by the first and second Baker factors." *Id.* 47a.[4] As to KBRSI's alleged negligent

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[4] The court found that Petitioner's claims for negligent hiring, retention, and entrustment were not preserved on appeal, but gave her "the benefit of the doubt" as to preservation of her "scarcely mention[ed] . . . negligent

(footnote continued on next page)

training of Respondent Irvine, the court concluded that the "claim would entail judicial scrutiny of sensitive judgments customarily entrusted to the military," and that it "could [not] be litigated without subjecting military judgments and policies to the kind of scrutiny prohibited by the political question doctrine." *Id.* 41a, 43a; *see also id.* 42a (noting (i) "record evidence indicating that KBR's drivers received instruction regarding some techniques directly from the military," and (ii) the district court's finding "that KBR employees were trained according to military standards"). The court of appeals also observed that "questions concerning military preparation and training have traditionally been entrusted to the executive and legislative branches [and] it is well settled that courts lack judicially manageable standard for passing on such questions." *Id.* 43a.

Along the same lines, the court concluded that "the inquiry necessary to adjudicate Carmichael's negligent supervision claim could not be cabined to KBR's supervisory practices, but would rather require examination of military policies and judgments." *Id.* 45a. The court explained that "the military's supervisory policies were deeply intertwined with KBR's." *Id.* 46a; *see also id.* 44a-45a (discussing jurisdictional evidence relating to Army supervision of LOGCAP contractor personnel). In particular, Petitioner's negligent supervision claim "would undeniably require Carmichael to show

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training and negligent supervision claims." Pet. App. 41a

that Irvine's driving was the sole cause of the accident, that Irvine's poor driving was due to fatigue, and that Irvine's fatigue was the result of KBR's supervisory practices." *Id.* 45a-46a. "[N]one of these determinations could possibly be made without also reviewing many sensitive military judgments and policies," and the court cannot "discern any readily available standards by which to answer such questions regarding supervisory matters." *Id.* 46a. [5]

5. The court of appeals denied Petitioner's requests for rehearing and rehearing en banc. *See id.* 80a-81a. She filed a timely petition for a writ of certiorari exactly 90 days later.

ARGUMENT

There is no reason for this Court to review the Eleventh Circuit's thorough, probing, and meticulously supported political question analysis. The court's holding that both the first and second *Baker* political question formulations apply to the circumstances of this case—a conclusion which is based on the court's careful review of the extensive jurisdictional evidence developed during pretrial

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[5] Judge Kravitch filed a separate opinion, concurring in part and dissenting in part. *See* Pet. App. 48a. She concurred "in the majority's conclusion that a court can not consider the individual negligence of the driver in this case without reexamining sensitive military decisions." *Ibid.* In her view, however, the Petitioner's negligent supervision claim should have been remanded "to the district court with instructions to make further jurisdictional findings on this issue." *Id.* 56a.

discovery—represents exactly the type of "discriminating inquiry into the precise facts and posture of the particular case" that *Baker* requires. *See* 369 U.S. at 217.

The Eleventh Circuit's decision is entirely consistent with this Court's political question jurisprudence and lower court precedents. It discusses at length, and in considerable detail, the specific reasons why adjudication of Petitioner's claims—*including Respondents' defense on the merits*—would be "inextricable" from *Baker*'s first and second political question formulations. *Id.* at 217.

As the court of appeals correctly concluded, the fundamental reason that adjudicating this suit would implicate nonjusticiable political questions is that the "*overwhelming evidence*" establishes that "*military judgments governed the planning and execution of virtually every aspect of the convoy* in which Sergeant Carmichael was injured." Pet. App. 16a, 19a (emphasis added). In other words, the jurisdictional evidence demonstrates that Respondents' every action relating to the military convoy incident in which Sgt. Carmichael was injured while serving in harm's way occurred entirely within—and cannot be isolated from—the U.S. military envelope. Petitioner fails to confront or acknowledge this fundamental jurisdictional fact, and instead, repeatedly begs the question of justiciability by arguing the alleged *merits* of her claims. *See generally Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93-94 (1998) (assailing an "attempt to convert the merits issue in this case into a jurisdictional one . . . because it carries the courts

beyond the bounds of authorized juridical action and thus offends fundamental principles of separation of powers").

Furthermore, there is no split of authority regarding the political question doctrine's applicability to personal injury suits against private contractors that provide logistical services to support U.S. military combat operations overseas. The only two circuits that have considered the subject agree that the political question doctrine renders an action nonjusticiable where, as here, there is a robust body of jurisdictional evidence demonstrating that prosecution and/or defense of a particular action would become unavoidably entangled in a labyrinth of U.S. military policies, judgments, and decisions.

I. THERE IS NO CONFLICT BETWEEN THE TWO CIRCUITS THAT HAVE ADDRESSED THE POLITICAL QUESTION DOCTRINE'S APPLICABILITY TO DAMAGES SUITS AGAINST MILITARY SUPPORT CONTRACTORS

Petitioner does not, and cannot, point to any doctrinal conflict regarding the applicability of the political question doctrine to combat-zone military support contractors.

Only two previous circuit decisions—*McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331 (11th Cir. 2007), and *Lane v. Halliburton*, 529 F.3d 548 (5th Cir. 2008)—directly address the subject. The certiorari petition filed in this case completely ignores both of those precedents. *McMahon* and *Lane*, and the opinion below, are in accord that the

political question doctrine bars damages actions against military support contractors where adjudication of a plaintiff's claims would require a court to reexamine military policies, judgments, or decisions. And all three cases are in agreement that a fully developed pretrial factual record, such as the extensive record of jurisdictional evidence here, sometimes is needed to support a determination that the political question doctrine applies to a particular damages suit against a military support contractor. Indeed, the political question issue is still percolating in both *McMahon* and *Lane*, where renewed motions to dismiss on political question grounds have been filed in district court following completion of pretrial discovery.

The Eleventh Circuit's opinion in this case is the first federal appellate decision to apply this Court's political question jurisprudence, including *Baker v. Carr* and *Gilligan v. Morgan*, as well as the political question principles adapted by the courts of appeals in *McMahon* and *Lane*, to a fully developed pretrial evidentiary record in a damages suit against a combat-zone military support contractor. Petitioner is mistaken, however, that "no court before has dismissed a case against a private entity on political question grounds." Pet. 9. During the past twenty years, a number of district courts have relied on the political question doctrine in dismissing wrongful death or personal injury claims against military

contractors in cases involving overseas, combat-related scenarios.[6]

Although the outcome of the Eleventh Circuit's definitive and unequivocal case-specific inquiry here differs from the *provisional* political question analyses in *McMahon* and *Lane*, which the courts of appeals in those two cases emphasized were based on limited evidentiary records, all three opinions are in harmony.

In *McMahon*, defendant Presidential Airways had "a contract with the Department of Defense . . .

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[6] *See, e.g., Whitaker v. Kellogg Brown & Root, Inc.*, 444 F. Supp. 2d 1277 (M.D. Ga. 2006) (damages suit involving U.S. soldier killed in vehicular accident while providing armed escort to contractor-driven military supply convoy in Iraq); *Smith v. Halliburton Co.*, No. Civ. A. H-06-0462, 2006 WL 2521326 (S.D. Tex. Aug. 30, 2006) (damages suit involving contractor employee killed by suicide bomber who attacked contractor-operated military dining facility in Iraq); *Bentzlin v. Hughes Aircraft Co.*, 833 F. Supp. 1486 (C.D. Cal. 1993) (damages suit involving military personnel killed in "friendly fire" accident during Operation Desert Storm in Iraq); *Zuckerbraun v. Gen. Dynamics Corp.*, 755 F. Supp. 1134 (D. Conn. 1990), *aff'd*, 935 F.2d 544 (2d Cir. 1991) (affirmed on other grounds without reaching political question issue) (damages suit involving U.S. Navy sailors killed by Iraqi attack on U.S.S. Stark); *Nejad v. United States*, 724 F. Supp. 753 (C.D. Cal. 1989) (damages suit involving Iranian civilians killed in shoot down of airplane by U.S.S. Vincennes in Persian Gulf); *cf. Corrie*, 503 F.3d 974 (damages suit implicating the political branches' decision to grant military aid to Israel).

to provide air transportation and other support services in aid of the military mission in Afghanistan." 502 F.3d at 1336. Three U.S. soldiers died when the Presidential aircraft that was transporting them crashed into a mountain. After the soldiers' survivors filed a negligence suit, Presidential moved to dismiss on several grounds, including the political question doctrine. Based on a scant, pre-discovery evidentiary record, the district court denied the motion to dismiss, in part because "it did not yet appear that [plaintiff's] tort claims against a private contractor would require the court to examine the judgments or strategy of the United States." *Id.* at 1337.

The Eleventh Circuit affirmed, but recognized that

> [w]here sensitive military judgments are involved, courts lack the capacity to determine the proper tradeoff between military effectiveness and the risk of harm to the soldiers. . . .
>
> When a private contractor agent is entrusted with making or executing such sensitive military judgments, courts would be similarly powerless to determine whether the agent appropriately balanced military effectiveness and the safety of the soldiers.

Id. at 1350. The court of appeals further stated that

> [e]ven if courts were competent to develop liability standards in the area of sensitive military judgments, it would breach

> separation of powers to apply those standards to the military.
>
> It would similarly violate separation of powers for the courts to interfere with sensitive military judgments made or executed by private contractor agents of the military.

Ibid.

The court of appeals held in *McMahon* that Presidential had "not satisfied the threshold requirement for invocation of the first *Baker* factor, at least on the limited record now before us that the instant case will require reexamination of any decision made *by the military*." *Id.* at 1360. Further, the court held "it is not evident on the limited record" that "the case will require the application of judicially unmanageable standards." *Id.* at 1363; *see also id.* at 1365 n.36 (emphasizing the limited record before the district court).

To underscore the preliminary nature of its political question ruling based on the limited, interlocutory record on review in *McMahon*, the court stated as follows:

> We expressly do not (and could not) hold that this litigation will not at some point present a political question. . . .
>
> But at this juncture, when *almost no discovery has been completed*, we cannot say that resolution of this case will require the court to decide a political question.

Id. at 1365 (emphasis added).

In *Lane*, decided subsequent to *McMahon*, the Fifth Circuit consolidated appeals of three damages suits filed against KBRSI and other entities by or on behalf of former employees who were killed or injured in Iraq when the military supply convoy trucks that they were driving were attacked by insurgents. The district court dismissed each action on political question grounds. *See* 529 F.3d at 555-56. The court of appeals reversed and remanded, agreeing with the plaintiffs only "to the extent of concluding that the case *needs further factual development* before it can be known whether [the political question] doctrine is actually an impediment." *Id.* at 554 (emphasis added). The court acknowledged "the command" that "matters implicating foreign relations and military matters are generally beyond the authority or competency of a court's adjudicative powers." *Id.* at 559. And it explained that

> Plaintiffs' negligence allegations move precariously close to implicating the political question doctrine, and *further factual development* very well may demonstrate that the claims are barred.
>
> . . . .
>
> It is conceivable that further development of the facts on remand will again send this case toward the political question barrier. Permitting this matter to proceed now does not preclude the possibility that the district court will again need to decide whether a political question inextricably arises in this suit.

Id. at 567-68 (emphasis added).

In its opinion here, the court of appeals drew a sharp factual and postural—but *not* doctrinal—contrast with its own opinion in *McMahon*, and with the Fifth Circuit's ruling in *Lane*. For example, the court indicated, based on *McMahon*'s limited factual record, that "the accident . . . took place during a more or less routine airplane flight." Pet. App. 36a. But here, with the benefit of a comprehensive pretrial factual record, the court concluded that "the military dimension of the underlying events is utterly central." *Ibid.* Furthermore, the court explained that its

> holding in McMahon was *merely provisional*, turning in key part on the *limited nature of the factual record* in the case. Given the *lack of discovery* in the case, we explained that it was simply *too soon to tell* whether the plaintiff's suit would implicate political questions. [502 F.3d] at 1362. We expressly noted, however, that a *different conclusion might be reached* if the question were raised again after development of the record. Id. at 1362 n.31.

Ibid. (emphasis added).

Along the same lines, the court explained that in *Lane*, "*no discovery* had been taken in the case. . . . the court had a *very limited factual record* to rely upon in determining whether the suit would raise political questions." *Id.* 37a (emphasis added). "Thus, as in McMahon, the court's conclusion was *preliminary*." *Ibid.* (emphasis added).

In its opinion below the court of appeals emphasized that the present case is postured quite differently than *McMahon* and *Lane* inasmuch as discovery has been completed, and based on the jurisdictional evidence developed during discovery, concluded that the political question doctrine bars Petitioner's suit:

> By contrast, the record before us in this case has been fully developed, and based on our review of the record, it is *completely evident* that the suit would require us to review *many basic questions traditionally entrusted to the military*, and that we have *no judicially manageable standards* for adjudicating the issues in the case.

Id. at 36a-37a (emphasis added). This Court should let that conclusion stand.

II. THE COURT OF APPEALS CORRECTLY CONCLUDED, BASED ON A FULLY DEVELOPED RECORD OF JURISDICTIONAL EVIDENCE, THAT THE POLITICAL QUESTION DOCTRINE BARS ADJUDICATION OF PETITIONER'S SUIT

After an exhaustive analysis, the Eleventh Circuit held that this suit "inevitably would require [the court] to address matters that have been definitively entrusted to other branches of the government, and to adjudicate questions that defy resolution by any judicially manageable standards." Pet. App. 47a. That conclusion turns upon, and is limited to, the jurisdictional facts of this case. The court's opinion applies existing political question

jurisprudence to those facts. It does not announce any new legal principles. And contrary to the certiorari petition, it neither represents "an unprecedented expansion of the political question doctrine," nor provides military support contractors with "*de facto* immunity from suit." Pet. 2, 9, 12.

Instead, the opinion below reflects the principle that "different cases involving different claims require their own discriminating inquiry under *Baker*." *Lane*, 529 F.3d at 568. Petitioner's disagreement with the outcome of the Eleventh Circuit's (and district court's) *Baker* inquiry into the facts and posture of this case is not a sufficient reason for Supreme Court review.

The petition reprises Petitioner's futile and unsuccessful efforts in the district court and court of appeals to characterize this action as an "everyday" case of "simple negligence"—merely an instance of "careless driving" resulting in a "wreck" that supposedly was "solely caused" by Respondent Irvine, whose "responsibilities for KBR were the same as if he was driving back home." Pet. 2, 3, 16. But the petition's "'simplistic labeling of this case as a 'garden variety road wreck' . . . ignores the true nature of the circumstances giving rise to this tragedy.'" Pet. App. 32a (quoting *Whitaker*, 444 F. Supp. 2d at 1282). As the court of appeals unequivocally concluded, the battalion of nonjusticiable political questions that would confront the district court if Sgt. Carmichael's combat-zone personal injury suit were allowed to proceed to trial are both unmistakable and unavoidable.

First, as the court of appeals emphasized throughout its opinion, "the military's control over fuel-supply convoys was 'plenary' . . . thus ensuring that virtually any question concerning the convoy's mission would inevitably implicate military judgments." *Id.* 36a. The court explained, for example, that "[t]hese convoy missions were highly dangerous," and as a result, "the convoys were heavily militarized." *Id.* 4a. "[I]t is the military, not civilian contractors, that decides when convoys are to be arranged, the routes to be traveled, the amount of fuel or other supplies to be transported, the speed at which the vehicles are to travel, the number of vehicles to be included in the convoy, the spacing to be maintained between the vehicles, and the security measures to be employed, and other details of the mission." *Id.* 5a-6a.

Second, "given the extent to which the convoy was subject to military regulation and control, the question of whether Irvine acted reasonably or breached the standard of care cannot be answered by reference to the standards used in ordinary tort cases." *Id.* 31a. The court of appeals explained that

> [i]n the typical negligence action, judges and juries are able to draw upon common sense and everyday experience in deciding whether the driver of a vehicle has acted reasonably. But these familiar touchstones have no purchase here, where any decision to slow down could well have jeopardized the entire military mission and could have made Irvine and other vehicles in the convoy more vulnerable to an insurgent attack.

Id. 33a.

Third, Petitioner's circular assertions that her claims do not implicate military decisions because she has "not blamed the military in any way," Pet. 2, ignores how Respondents would *defend* this negligence suit if it were to go to trial, especially as to the element of causation. *See* Pet. App. 27a ("KBR would inevitably . . . try to show that unsound military judgments and policies surrounding every aspect of the . . . convoy were either supervening or concurrent causes of the accident.").

For example, as the court of appeals indicated, "any defense mounted by KBR or Irvine would undoubtedly cite the military's orders as the reason why Irvine did not reduce his speed." *Id.* 23a. KBRSI drivers were required to maintain both the speed and follow distance set by the U.S. military convoy commander who was in charge of the convoy at issue. *Id.* 5a-6a, 16a.[7] The record establishes that the military convoy commander failed to slow down

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[7] The Army explained in this case that "[t]he military convoy commander was in total command and control of the convoy, including setting the speed at which the convoy traveled [and] had the sole authority to initiate tactical measures relating to the convoy, including adjusting the convoy speed." Pet. App. 21a (quoting Declaration of Staff Sgt. Hansen, who was Team Leader of Sgt. Carmichael's convoy mission squad). The military convoy commander's directives were conveyed to the KBRSI civilian convoy commander (i.e., convoy foreman), who in turn conveyed them to KBSRI truck drivers such as Respondent Irvine. *See id.* 21a-22a.

the convoy in response to a warning about the jolting "S" curve in the road—a warning that a KBRSI truck driver several vehicles ahead of Respondent Irvine's vehicle radioed to all convoy personnel prior to the rollover incident. *Id.* 26a (citing Staff Sgt. Hansen's declaration). As part of its defense, "KBR would surely . . . argue that the military convoy commander was negligent in setting too fast a pace along the particularly treacherous route for the convoy, and in specifically ignoring evidence to this effect." *Ibid.* Even if Respondent Irvine had "flouted the military's orders," the "fact remains that Irvine's conduct was at all times governed by military rules and regulations (including timing, route, speed, and spacing), and any attempt to assess the reasonableness of Irvine's conduct would entail an examination of those rules and regulations." *Id.* 23a, 22a n.10.[8]

Petitioner's contention, therefore, that this is merely a case "that may touch on political issues," but "does not require the review of any military

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[8] The petition misplaces reliance on KBRSI's "internal investigation" of the rollover incident. Anecdotal assertions about the incident's causes and contributing factors in the Incident Report sheet filled out by KBRSI (R5-97, Ex. 4) cannot be isolated from the U.S. Army's decisionmaking and conduct in connection with the convoy at issue. Indeed, the petition fails to note that the Incident Report emphasized that "This Incident Occurred in a Combat Zone." Furthermore, as the court of appeals explained, "[t]he fact that KBR's investigation mentions only Irvine's conduct does not establish that Irvine was the sole cause of the accident." Pet. App. 24a.

decision," Pet. 11, 12, is incorrect. Petitioner concedes that a jury "would be asked whether KBR and Irvine exercised ordinary care *under the circumstances*"—which the petition acknowledges includes "the Army's choice of route [and] other Army decisions." *Id.* 13 (emphasis added). As the court of appeals concluded, "the circumstances under which the accident took place were *so thoroughly pervaded by military judgments and decisions*, it would be impossible to make any determination regarding Irvine's or KBR's negligence without bringing those essential military judgments and decisions under searching judicial scrutiny." Pet. App. 18a (emphasis added). Contrary to the petition, this clearly is not a case limited to the same negligence issues that would be involved in connection with a driving a "routine convoy . . . back home." Pet. 2, 3. Instead, "[g]iven the circumstances under which the accident in this case took place . . . the question before the Court would be what a reasonable driver subject to *military control* over his exact speed and path would have done. Pet. App. 31a, 32a (emphasis added). "Simply put, [courts] have no readily available judicial standard with which to answer this question." *Id.* 32a.[9]

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[9] Petitioner's analogy to an automobile accident in a poorly designed municipal intersection, Pet. 13, is inapt. Unlike the present case, a negligence suit involving such an accident would not implicate questions that are constitutionally committed to Congress or the Executive Branch, or for which no judicial standards exist.

The petition again misses the point of the political question doctrine by asserting, contrary to the record, that KBRSI exercised "exclusive control" over Respondent Irvine's work schedule, and that as a result of KBRSI's alleged negligent supervision of that schedule, Respondent Irvine was fatigued at the time of the rollover incident. Pet. 18. Even if that were true, any attempt to prove that KBRSI's alleged negligent supervision and/or Respondent Irvine's alleged fatigue was the sole cause of the accident would necessarily implicate "the potential causal role played by pivotal military judgments." Pet. App. 46a. Thus, the applicability, if any, of federal motor carrier work schedule regulations to Respondent Irvine's military fuel supply convoy activities in Iraq, *see* Pet. 17, is immaterial to the political question issue. Indeed, as the court of appeals confirmed, "[c]ourts are simply not equipped to pass judgment on the degree of supervision appropriately exercised over personnel charged with performing the tasks Irvine was charged with performing." Pet. App. 47a. Similarly, Judge Kravitch's partial concurrence and dissent—which would have remanded only the negligent supervision claim, and only for further jurisdictional findings, *id.* 56a—failed to appreciate the inextricable link between that claim and the nonjusticiable political questions that this suit unavoidably provokes.[10]

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[10] Despite the court's determination that Petitioner failed to preserve her so-called "negligent hiring" claim, *see* Pet. App. 41a, the petition alludes to that claim, *see* Pet. 2, 8, 18, and asserts that Respondent Irvine was "an unqualified driver," *id.* 2. The record indicates, however,

(footnote continued on next page)

Finally, although the court of appeals did not reach the third or fourth *Baker* political question formulations, Respondents submit that they, as well as the first two formulations, apply to this case. The third formulation relates to the "impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion." *Vieth*, 541 U.S. at 278 (citing *Baker*, 369 U.S. at 217). This third formulation applies here because the decision to use civilian contractors to provide overseas logistical services such as military fuel supply convoy support, the placement of military personnel in harm's way, and the levels of force protection and standards of interaction between military personnel and civilian contractors in hostile areas such as Iraq, necessarily require initial policy decisions clearly committed to the discretion of the military branches.

The fourth *Baker* formulation, "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government," *ibid.*, also applies here. This is because a judicial decision calling into question the military policies of the United States regarding its military efforts in Iraq during Operation Iraqi Freedom would express a lack of respect to both the Executive Branch and Congress.

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that Respondent Irvine had substantial experience driving fuel tankers in military support convoys, and that his only alleged "lack of qualification" for the job was an erratic blood pressure reading at the time he initially applied to KBRSI for employment. Respondent Irvine was hired several months later, after controlling his blood pressure with medication. *See* Pet. App. 8a, 8a n.7.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action File
Number 1:06-cv-507-TCB

ANNETTE CARMICHAEL, Individually and as Guardian for KEITH CARMICHAEL, an incapacitated adult,
Plaintiff,

v.

KELLOGG, BROWN & ROOT SERVICES, INC., HALLIBURTON ENERGY SERVICES, INC. and RICHARD IRVINE,
Defendants.

ORDER

I. Background

On May 22, 2004, Sergeant Keith. Carmichael, a soldier in the Milted States Army, was serving as a military escort for a convoy of trucks allegedly owned and. operated by Defendants Kellogg, Brown & Root Services, Inc. and Halliburton Energy Services, Inc. Carmichael was a passenger in a tractor-trailer driven by Defendant Richard Irvine, a civilian who, according to Plaintiff, was an employee of both Defendants.

While travelling from Logistics Support Area Anaconda to Al Asad, Iraq, Irvine lost control of the tractor-trailer and drove of the road, whereupon the tractor-trailer overturned in a ravine. Despite

wearing a seatbelt, Carmichael was partially ejected from the cab of the tractor. His head and chest were pinned between the tractor and the ground. Six to seven minutes passed before rescuers could dislodge his body. During this time he experienced a loss of oxygen to his brain. As a result, he suffered massive injuries and is now in a permanent vegetative state.

On February 1, 2006, Carmichael's wife, Plaintiff Annette Carmichael, individually and as her husband's guardian, filed this action in state court, alleging that Irvine negligently operated the tractor-trailer at an excessive speed and failed to maintain control of the tractor-trailer, thereby causing the accident. She claims that the corporate Defendants are vicariously liable for Irvine's allegedly negligent conduct under the doctrine of respondeat superior. She also contends that they are directly liable for negligently selecting, training and supervising Irvine.

All three Defendants have filed motions to dismiss the complaint, arguing two grounds. First, Defendants contend that Plaintiffs claims are nonjusticiable under the political question doctrine. Second, Defendants contend that as military defense contractors they are immune from liability under the combatant activities exception to the Federal Tort Claims Act ("FTCA").

II. Discussion

A. Standard on Motion to Dismiss

The law in. this Circuit governing motions to dismiss pursuant to Rule: 12(b)(6) for failure to state a claim is well settled. Dismissal of Plaintiffs claims is suitable only when no construction of the factual allegations will support the cause of action on the basis of a dispositive issue of law. *Marshall County*

Bd. of Ethic. v. Marshall County Gas Dist., 992 F.2d 1171, 1174 (11th 07.1993).

B. Defendants' Motions to Dismiss

1. Political Question

The political question doctrine is a function of the separation of powers among the three branches of government, and it "excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Ass'n v. Am. Cetacean Soc.*, 478 U.S. 221, 230 (1986).

In *Baker v. Carr*, the Supreme Court set forth six elements indicative of a nonjusticiable political question:

> (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department;
>
> (2) a lack of judicially discoverable and manageable standards for resolving it;
>
> (3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion;
>
> (4) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government;
>
> (5) an unusual need for unquestioning; adherence to a political decision already made; or
>
> (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

369 U.S. 186, 217 (1962). These tests are "probably listed in descending order of both importance and certainty." *Veith v. Jubelirer*, 541 U.S. 267, 278 (2004). At least one of these elements must be evident for the political question doctrine to apply. *Baker*, 369 U.S. at 217.

Defendants contend that the first element is implicated because Plaintiff's complaint necessarily raises issues that are committed to the discretion. of the political branches of government. Defendants argue that because the route and speed of convoys are set by the military and not by civilian drivers, the conduct of the military and its handling of supply convoys used to support ongoing military operations would necessarily be questioned were this case allowed to go forward.

Defendants also argue that the second factor applies to this case because no judicially manageable standards exist for the resolution of the issues. Defendants claim that if this case is not dismissed, the Court will be required to evaluate the conduct of both the military and Defendants without having any standards with which to do so.

Finally, Defendants claim that the third and fourth Baker factors apply because the standards of interaction between the military. and civilian contractors in a combat zone :require initial policy decisions clearly committed to the discretion of the political branches, and a judicial decision calling into question the conduct of the United States concerning its ongoing military efforts in Iraq would express a lack of respect due to the coordinate branches of government that oversee those war efforts.

In support of their argument, Defendants cite several cases barring claims because of the political question doctrine, including *Nejad v. United States*, 724 F. Supp. 753 (C.D. Cal. 1989); *Bentzlin v. Hughes Aircraft*, 833 F. Supp. 1486 (C.D. Cal. 1993); *Zuckerbraun v. Gen. Dynamics Corp.*, 755 F. Supp. 1134 (D. Conn. 1990); *Whitaker v. Kellogg Brown & Root, Inc.*, No. 4:05-CV-78, 2006 U.S. Dist. 45708 (M.D. Ga. July 5, 2006); and *Smith v. Halliburton Co.*, No. H-06-0462, 2006 U.S. Dist. LEXIS 61980 (S.D. Tex. Aug. 30, 2006).

The Court has reviewed the cases cited by the parties, as well as several other authorities, and concludes that the court in *Lessin v. Kellogg Brown & Root*, No. H-05-01853, 2006 U.S. Dist. LEXIS 39403 (S.D. Tex. June 112,, 2006), best states the test for cases in which a member of the United States military is injured or killed as a. result of the alleged negligence of a government defense contractor working with the military: the plaintiffs claims are barred by the political question doctrine if "military decision-making or policy would be a necessary inquiry, inseparable from the claims asserted." *Id.* at *7.

In *Lessin*, a member of the United States Army was providing a military escort for a commercial truck convoy. While en route to Kuwait, one of the convoy trucks suffered an equipment malfunction. The truck stopped at the side of the route and *Lessin* attempted to assist the driver. While doing so, he was struck in the head by the ramp assist arm for the truck and suffered a traumatic brain injury.

In support of its motion to dismiss plaintiffs complaint as nonjusticiable under the political question doctrine, the defendant cited *Nejad*, *Bentzlin* and *Zuckerbraun*. The court correctly distinguished these

cases on the ground that in each case, the court explicitly recognized that plaintiffs claims necessarily implicated military decision-making or policy.

Smith v. Halliburton Co., *supra*, also relied upon by Defendants here, is distinguishable on the same basis as *Nejad*, *Bentzlin* and *Zuckerbraun*; the plaintiffs claims, if allowed to proceed, would have required the court to "second-guess the decisions of the United States military, even though the suit is ostensibly against only military contractors." 2006 U.S. Dist. LEXIS 61980 at *20.[1]

The other case relied upon by Defendants is *Whitaker*, which was decided less than a month after *Lessin*.[2] The *Whitaker* case involved a soldier who was providing an armed escort for a military supply convoy. He stopped his vehicle on a bridge over the Tigris River after a vehicle in front of him hit the guard rail and fell off the bridge. Another driver struck Whitaker's vehicle from behind, knocking it close to the edge of the bridge where the guard rail had been destroyed. Whitaker tried to extricate himself from the vehicle, whereupon he fell into the river and drowned. The court found that because the convoy operation was planned by the military and the military determined the placement of vehicles in the convoy, the speed of the convoy and the distance

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[1] The court in *Smith* granted the defendants' renewed motion to dismiss, which was filed after discovery was conducted. The Court had previously denied the defendants' original motion to dismiss—also predicated on the political question doctrine—because of its reluctance to dismiss the complaint "[a]t this early stage of the litigation." *See Smith v Halliburton Co.* No. H-06-0462, 2006 U.S. Dist. LEXIS 30530 at *14 (S.D. Tot. May 16, 2006). This Court shares the same reluctance.

[2] The opinion in *Whitaker* does not cite the *Lessin* decision.

between vehicles in the convoy, inquiries regarding military decision-making would be inextricable from the plaintiffs' claims.

The Court respectfully disagrees with the holding in *Whitaker* and chooses instead to follow the holding in *Lessin*. The Court finds that at this stage of the proceedings it is not yet certain whether inquiries into military decision-making would be necessitated by Plaintiff's claims. The discovery period has just begun, and because of the limited facts, it is impossible to say with certainty whether this case will involve a nonjusticiable political question. For example, it is conceivable that at the time of the accident Defendant Irvine was driving the truck within the speed limit set by the military yet in a manner that was negligent in some other respect. In that event, the political question doctrine would not necessarily bar Plaintiff's claims.

Because the Court cannot at this stage of the proceedings determine that any of the factors set forth in *Baker* apply to Plaintiffs claims, Defendants' motions must be denied to the extent they are based upon the political question doctrine. If additional facts appear during the discovery period that are germane to Defendants' political question argument, Defendants may renew their motions to dismiss on this ground.

2. Federal Tort Claims Act

Defendants also argue that Plaintiffs state law claims are preempted by federal law—the combatant activities exception to the Federal Tort Claims Act ("FTCA")-and therefore barred.

The FTCA constitutes a limited waiver of sovereignty by the United States from civil suit and dam-

ages, with certain exceptions. One such exception is the combatant activities exception, which excludes "[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during a time of war." 28 U.S.C. 2680(j).

Defendants acknowledge that the express terms of the FICA, provide a waiver of immunity (and exceptions to that waiver of immunity) only to the United States Government, not private parties. However, Defendants contend that in two cases—*Koohi v. United States*, 976 F.2d 1328 (9th Cir. 1992), and *Bentzlin v. Hughes Aircraft*, 833 F. Supp. 1486 (C.D. Cal. 1993)—the combatant activities exception to the waiver of immunity has been extended to government contractors.

To consider Defendants' argument, it is necessary to analyze not only *Koohi* and *Bentzlin*, but also the Supreme Court opinion upon which the immunity defense provided by those two cases is founded: *Boyle v. United Technologies Corporation*, 487 U.S. 500 (1988).

David Boyle was a U.S. Marine helicopter copilot who was killed when his helicopter crashed during a training exercise. Although he survived the impact of the crash, he was unable to escape from the helicopter, and drowned. His father sued the Sikorsky Division of United Technologies Corporation ("Sikorsky"), which built the helicopter for the United States.

Plaintiff presented two theories of liability under state tort law. First, he alleged that Sikorsky had defectively repaired a device called the servo in the helicopter's automatic flight control system, which allegedly malfunctioned and caused the crash. Second, he alleged that Sikorsky had defectively

designed the copilots emergency escape system the escape hatch opened out instead of in (and was therefore ineffective in a submerged craft because of water pressure), and access to the escape hatch handle was obstructed by other equipment.

The Supreme Court framed the issue as follows: "This case requires us to decide when a contractor providing military equipment to the Federal Government can be held liable under state tort law for injury caused by a design defect." 487 U.S. at 502, 108 S. Ct. at 2513 (emphasis added). Stated differently, the Court considered whether the plaintiffs state law tort claims were preempted by federal common law, despite the absence of federal legislation specifically immunizing government contractors.[3]

The Court held that in a few areas involving "uniquely federal interests," state law is preempted and replaced, where necessary, by federal law if a "significant conflict" exists between an identifiable federal policy or interest and the operation of state law, or if the application of state law would frustrate specific objectives of federal legislation. In such cases, the content of the federal law is prescribed by the courts (absent explicit statutory directive).

Applying this two-step process to determine whether the plaintiffs state law claims were preempted, the Court first considered whether the

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[3] It is important to note that the government contractor defense created by *Boyle* results in the preemption of certain state law causes of action, not a grant of immunity to contractors. In footnote 1 of its opinion in *Boyle* the Court expressly slated that it was not addressing the issue of immunity, "as it is not before us." 487 U.S. at 505 n.1.

subject matter at issue was an area of uniquely federal interest. The Court identified the area at issue as "the civil liabilities arising out of the performance of federal procurement contracts." 487 U.S. at 506.

The Court then found that the state law-imposed duty of care (the duty to equip helicopters with the sort of escape-hatch mechanism that the plaintiff claimed was necessary) conflicted with the duty imposed by the Government contract (the duty to manufacture and deliver helicopters with the sort of escape-hatch mechanism shown by the specifications).

Next, the Court had to determine whether the conflict between the state tort law and the area of uniquely federal interests was "significant." The Court expressed concern that, absent some limiting principle, conflicts between state tort law and areas of uniquely federal interests would too often be deemed "significant," resulting in preemption of state law.

As an example, the Court offered a hypothetical in which a federal procurement officer orders, by model number, a quantity of stock helicopters that happen to be equipped with escape hatches opening outward. In such a case it could not be said that the Government has a significant interest in that particular feature because the Government, i.e., the procurement officer, gave no consideration to the outward-opening feature of the escape hatch when he placed the stock order for the helicopters. Thus, in such a case it could not be said that the conflict between state tort law and "the civil liabilities arising out of the performance of federal procurement contracts" was "significant."

Rather, there must be a limiting principle to identify those situations *in which a "significant"* conflict with federal policy or interests exists. The Court found such a limiting principle in the discretionary function exception to the FTCA. That exception exempts the Government from civil liability on any claim based upon the Government's exercise or performance, or the failure to exercise or perform, a discretionary function. 28 U.S.C. § 1346(b).

The Court stated that the selection of the appropriate design for military equipment used by our Armed Forces is "assuredly a discretionary function" since it often involves "not merely engineering analysis but: judgment as to the balance of many technical, military, and even social considerations, including specifically the trade-off between greater safety and greater combat effectiveness." 487 U.S. at 511.

Having waded through the foregoing analysis, the Court held that state tort law that imposes liability for design defects in military equipment is displaced where (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about dangers in the use of the equipment known to the supplier but not to the United States.

Having described the Supreme Court's holding in *Boyle*, the Court now looks at the two cases cited by Defendants—*Koohi* and *Bentzlin*—which purport to be premised upon *Boyle*.

In *Koohi*, a U S. warship equipped with the Aegis air defense system mistook a civilian Iranian airplane for an Iranian F-14 and shot it down, killing all 290 persons aboard. The plaintiffs-heirs of some of

the deceased passengers and crew-sued the United States for negligent operation of its warship and sued the weapons manufacturers for design defects in the Aegis system"

Citing *Boyle*, the court held that the claim against the defense contractors was preempted—not by the MA's discretionary function exception to immunity, but by the FTCA's combatant activities exception, 28 U.S.C. § 2680(j). Thus, at the outset it should be noted that the government contractor defense created in *Boyle* differs from the defense created in *Koohi*. The former was rooted in the discretionary function exception to the FTCA's waiver of government immunity, whereas the latter was rooted in the combatant activities exception.

"The court's reasoning in *Koohi* was that one of the purposes of the combatant activities exception is to recognize that during wartime, no duty of care is owed to those against whom military force is directed. The court reasoned that imposing liability on the civilian manufacturer of a weapons system used in an accidental shooting of a civilian aircraft "would create a duty of care where the combatant activities exception is intended to ensure that none exist." *Id.* at 1336-37.

Significantly, most of the Ninth Circuit's opinion in *Koohi* is devoted to issues other than whether the plaintiffs' state law tort claims against the government contractor should be preempted by federal law. The majority of the opinion addresses (1) whether the political question doctrine barred all of the claims" and (2) whether the *government* was immune to the plaintiffs' claims under the FTCA and the Public Vessels Act.

Just one paragraph of the court's opinion in *Koohi* is devoted to the issue of whether the plaintiffs' claim against the defense contractors was preempted in accordance with *Boyle*. And that one paragraph is conclusory, not analytical.

Moreover, the court focused on the fact that no duty of care is owed to those against whom military force is directed, which is understandable because the force at issue in that case was directed by the Government against a perceived enemy (an Iranian F-14 aircraft). Here, Plaintiff's husband was not injured because by the United States because he was perceived as its enemy; rather, Sergeant Carmichael was a United States soldier/citizen injured (allegedly) by a private contractor.

Finally, *Koohi* represents an expansion of the holding in *Boyle* that the Supreme Court may or may not have intended. And *Koohi* is not binding in this circuit.

For all of these reasons, this Court is not inclined to follow the Ninth Circuit's opinion in *Koohi*.

The other case cited by Defendants that purports to be based upon the Supreme Court's holding in *Boyle* is *Bentzlin v. Hughes Aircraft Company*, a district court opinion from the Central District of California. In *Bentzlin*, the plaintiffs were family members of six Marines who were killed in combat during Operation Desert Storm in the course of the Persian Gulf War. The Marines were riding in a vehicle toward enemy Iraqi forces when a Maverick AGM-65D missile, fired from a U.S. Air Force A-10 aircraft, struck the vehicle and killed the Marines. Plaintiffs claimed that a product defect caused the missile to deviate from its intended target and strike the Marines.

Recognizing *Boyle*'s bar of state tort law *design* defect claims, the plaintiffs alleged that their claims arose from a *manufacturing* defect. But the court dismissed the action anyway, holding that *Boyle*'s government contractor defense extended to both design and manufacturing defect claims.

Central to the court's well-reasoned holding in *Bentzlin* was its finding that allowing state tort law claims based upon the Maverick missile's alleged defective condition would necessitate the disclosure of the missile's design, which would contravene the Government's strong interest in preserving the secrecy of its weaponry. Obviously, such a finding would tend to compel the conclusion that, in accordance with. the test prescribed in *Boyle*, Plaintiffs' claims were preempted (since those claims, if allowed, would create a substantial conflict between state tort law-imposed duties and the Government's obvious, and uniquely federal, interest in preserving the secrecy of its weaponry).

Also important to the court in *Bentzlin* was the fact that the Government had intervened in the case and moved to dismiss under the political question and state secrets doctrines. The court recognized the "longstanding rule" that liability for manufacturing defects exists against government contractors "unless the government has formally taken a position that such a suit should not be maintained." *Id*. at 1491 n.8.

Significantly, none of these factors is present in the instant case. It does not yet appear that allowing Plaintiff to proceed with her state tort law claims would contravene the Government's interest in preserving military secrets. And the Government

has riot intervened in this case and moved to dismiss under the political question or state secrets doctrines.

Two district courts—both from the Southern District of Texas—have recently distinguished *Bentzlin* and allowed claims to proceed against military contractors: *Fisher v. Halliburton*, 390 F. Supp. 2d. 610 (S.D. Tex. 2005), and *Lessin*, *supra*.

In *Fisher*, the court distinguished *Boyle* and *Koohi* on the ground that they presented claims involving complex, allegedly defective equipment provided by government contractors to the United States for military use, in circumstances, i.e., the Government's procurement process, "which inevitably implicates nuanced discretion and sophisticated judgment by military experts." *Id.* at 616. Noting that the plaintiffs' claims did not involve any allegations that the Defendants had supplied equipment, defective or otherwise, to the military, the court concluded that "extension of the government contractor defense beyond its current boundaries is unwarranted." *Id.*

In *Lessin*, the plaintiff', like the Plaintiff's husband in this case, was a soldier who was providing a military escort for a commercial truck convoy allegedly owned, operated or controlled by Defendant. While attempting to assist the driver of a truck that had suffered an equipment malfunction, *Lessin* was struck in the head by the ramp assist arm for the truck and suffered a traumatic brain injury. 2006 U.S. Dist. LEXIS 39403 at *1-2.

Lessin sued Kellogg, Brown & Root, alleging that it was negligent in inspecting, maintaining and repairing; the truck that injured him, and in supervising the driver who was operating the truck. Lessin also alleged that the truck driver was negligent in

using the ramp assist arm of the truck, and in failing to warn Lessin.

The court denied the defendant's motion to dismiss, finding that the "vital distinction" between that case and *Fisher*, on the one hand, and *Koohi* and *Bentzlin*, on the other, was the military's role in the incident at issue:

> In both *Koohi* and *Bentzlin*, the injuries at issue arose from the United States' use of weapons during combat. Thus" as the court held in *Fisher*, "each of these cases involved claims involving complex equipment acquired by the Government in its procurement process, which inevitably implicates nuanced discretion and. sophisticated judgments by military experts." *Id.* at 616. Such military decision-making is not implicated here, where, instead of manufacturing weapons, which were then procured and utilized by the military in combat, Defendant itself provided a convoy service. Additionally, in *Koohi*, the court was also concerned with the lack of any duty of reasonable care owed to a perceived enemy during combat. This case, on the contrary, concerns the duty of care owed by a private corporation to United States citizens, and the concern noted by the court in *Koohi* is inapplicable to this case.
>
> In the absence of additional authority, and in light of the distinctions between the *Koohi* and *Bentzlin* cases and the case at bar, the Court declines to extend the combatant activities exception. Accordingly, Defendant's motion to dismiss this case as barred by the combatant activities exception to the FTCA is denied. Again, dismissal is without prejudice to Defen-

dant's right to renew the motion if facts adduced in discovery so warrant.

2006 U.S. Dist. LEXIS 39403 at *14-15.

As with the issue of the applicability of the political question doctrine, the Court finds that the district court's opinion in *Lessin* is persuasive and should be followed. Furthermore, *Koohi* and *Bentzlin* represent expansions of the holding in *Boyle* that the Supreme Court may or may not have intended. And neither case is binding in this circuit.

Accordingly, the Court concludes that Defendants have failed to show that as a. matter of law the combatant activities exception to the FTCA's grant of immunity applies to this case and that Plaintiffs claims therefore are preempted and should be dismissed. As with Defendants' motion to dismiss based upon the political question doctrine, if additional facts appear during the discovery period that are germane to Defendants' FTCA argument, Defendants may renew their motions to dismiss on this ground.

III. Conclusion

For all of these reasons, Defendants' motions to dismiss [4 and 6] are DENIED.

IT IS SO ORDERED this 19th day of September, 2006.

/s/ Timothy C. Batten, Sr.
Timothy C. Batten, Sr.
United States District Judge